

STATE OF MICHIGAN
COURT OF APPEALS

DENISE KLAUSING and WILLIAM
KLAUSING,

Plaintiffs-Appellants,

v

UPTOWN GRILLE, L.L.C.,

Defendant-Appellee.

UNPUBLISHED
December 17, 2013

No. 311945
Oakland Circuit Court
LC No. 2011-120632-NO

Before: JANSEN, P.J., and O'CONNELL and M. J. KELLY, JJ.

PER CURIAM.

In this premises-liability action, plaintiffs appeal by right the circuit court's order granting defendant's motion for summary disposition. We affirm.

Plaintiffs argue that there remained a genuine issue of material fact concerning whether the slippery condition of the restaurant's floor was open and obvious. Specifically, plaintiffs assert that because some witnesses stated that the floor was dull in appearance, and not shiny or glossy, the slippery condition of the floor was not open and obvious in nature. We disagree.

We review de novo the trial court's decision on a motion for summary disposition. *Allen v Bloomfield Hills Sch Dist*, 281 Mich App 49, 52; 760 NW2d 811 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). We consider the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). Summary disposition should be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

It is undisputed that plaintiff was an invitee when she entered defendant's restaurant on June 6, 2011, for the purpose of purchasing lunch. Generally, an owner of land owes a duty to an invitee to exercise reasonable care to protect the invitee from an unreasonable risk of harm caused by a dangerous condition on the land. *Lugo v Ameritech Corp, Inc*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, "a merchant's duty of reasonable care over the physical premises does not extend to open and obvious physical hazards because of an invitee's coexisting ability to take reasonable measures to avoid such hazards." *Bailey v Schaaf*, 494 Mich 595, 606; 835 NW2d 413 (2013). If the dangers of the premises are known to the invitee

or are obvious to an extent that the invitee could reasonably be expected to discover them, the premises owner does not owe a duty to protect or warn the invitee, unless “special aspects of a condition make even an open and obvious risk unreasonably dangerous.” *Lugo*, 646 Mich at 516-517. Generally, whether a condition is open and obvious is considered objectively, considering whether an average person with ordinary intelligence would have discovered the condition upon casual inspection. *Price v Kroger Co of Mich*, 284 Mich App 496, 500-501; 773 NW2d 739 (2009).

It was beyond genuine factual dispute that the slippery condition of the floor was open and obvious in nature and that plaintiff was aware of the floor’s condition. Plaintiff admitted in her deposition that she noticed the floor was slippery when she entered the restaurant, and she mentioned how slippery the floor was to the members of her lunch group. Plaintiff actually slipped, but did not fall, minutes after entering the restaurant. Two witnesses stated that the appearance of the floor in the back room, where plaintiff ultimately fell, was similar to the floor at the front of the restaurant near the hostess stand.

Plaintiffs argue that because there was some conflicting testimony regarding whether the floor was dull or glossy in appearance, there was a question of fact regarding whether the slippery condition was open and obvious. The dullness of the floor, however, is not the exclusive, or even the most logical, method to determine the slipperiness of the floor. Floors that are dull in appearance may be slippery; shiny, glossy floors may not be. Even viewing the evidence in the light most favorable to plaintiffs, the fact that plaintiff had personal, actual knowledge that the floor was slippery is dispositive. Plaintiffs do not argue on appeal that plaintiff was unaware of the slippery condition; her actual knowledge of the condition was sufficient to settle any question on this issue.

Even without plaintiff’s actual knowledge, an average person of ordinary intelligence would have been aware of the slippery floor upon casual inspection. Plaintiff slipped and nearly fell within minutes of entering the restaurant. Other patrons of the restaurant on June 6, 2011, noticed that the floor was slippery as well. By all accounts, a casual inspection of the floor, or a few steps inside the restaurant, would have revealed to an average person of ordinary intelligence that the floor was slippery and that caution was required.

Plaintiffs also argue that the trial court should have considered that the slippery floor of the restaurant was unavoidable. Specifically, plaintiffs argue that even if the slippery condition was open and obvious, once plaintiff was inside the restaurant, the condition became unavoidable because there was no way to escape the building without traversing the slippery floor. We disagree.

Only special aspects that give rise to a uniquely high likelihood of harm or severity of harm will serve to remove that condition from the open and obvious danger doctrine. *Lugo*, 464 Mich at 519. The special aspects exception to the open and obvious doctrine is a narrow one. *Hoffner v Lanctoe*, 492 Mich 450, 462; 821 NW2d 88 (2012). For example, in most circumstances, a slippery walkway does not constitute an unreasonably hazardous condition, even if it leads to the only accessible exit, because a person can generally wait until the slippery condition is removed before attempting to traverse it. See *Joyce v Rubin*, 249 Mich App 231, 242-243; 642 NW2d 360 (2002).

Plaintiff maintains that once she was inside the restaurant, she could not leave the building without walking on the slippery floor. But after becoming aware of the slippery condition, plaintiff decided to walk from the hostess stand to the table in the back room, then exited the room to take a phone call, and then returned to the back room to rejoin the group after the call. Plaintiff could have immediately exited the restaurant when she was initially confronted with the open and obvious danger. Alternatively, plaintiff could have asked restaurant staff to remove the slippery condition or provide her with mats to walk on. See *id.* It is clear that the condition was not unavoidable or unreasonably hazardous, as plaintiff and members of her group walked through the restaurant successfully prior to plaintiff's fall.

Under the circumstances, there were many reasonable means by which plaintiff could have avoided walking on the slippery floor. Instead, plaintiff chose to continue walking in the restaurant. The condition of the floor did not constitute a special aspect giving rise to an exception to the open and obvious danger doctrine.

Affirmed. As the prevailing party, defendant may tax costs pursuant to MCR 7.219.

/s/ Kathleen Jansen
/s/ Peter D. O'Connell
/s/ Michael J. Kelly